

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

K. Decker PL 2

7543

FILE: B-192203

DATE: September 5, 1978

MATTER OF: Durden & Fulton, Inc.

DIGEST:

1. The failure to initial a bid correction made with liquid paper where there is no doubt of the intended bid price is an informality which is waived in the interest of the Government.
2. Protester's contention that the low bidder was not responsive to specification changes made in an amendment to the solicitation is without merit when there is specific evidence that the bidder did acknowledge receipt of the amendment.
3. A bid modified by a representative attorney of a firm authorized by the bidder to act as its agent, where proof of agency is submitted after bid opening, is nevertheless a responsive bid.
4. In Navy procurement involving a base bid and additive item, contracting officer must determine and record, prior to bid opening, the amount of funds available for determining the low bidder. Should additional funds become available to the agency after bid opening, as alleged by protester, the available funds may be increased for determining the bid items to be awarded only to the extent the low bidder as initially determined remains low.

By letter dated June 16, 1978, Durden & Fulton, Inc. (Durden) protests any award by the Naval Air Station, Corpus Christi, Texas (Navy), to Fortec

Constructors, a Joint Venture, for the construction of a heat treatment facility under IFB N62467-75-B-0505.

The protester initially argued as follows:

1. There were changes on Fortec's original bid evidenced by liquid paper that had not been initialed in conformance with the instructions to the bidders.
2. Although Fortec's bid allegedly was dated June 1, 1978, the solicitation was amended on June 2, 1978, which changed the scope of the work, thus creating an ambiguous and material deviation from the solicitation requirements.
3. Fortec's attempt to modify its bid just prior to bid opening was deficient in that it failed to identify the project and there is no evidence that the signer of the modification was authorized to do so.

Regarding Durden's objections to Fortec's failure to initial a bid correction made with liquid paper, we have consistently held that if an uninitialed erasure and correction leave no doubt as to the intended bid price, there is a legally binding offer, acceptance of which would consummate a valid contract which the bidder would be obliged to perform at the offered price. Under such circumstances we have concluded that the requirement for initialing changes is a matter of form which may be considered an informality and waived in the interest of the Government. See 49 Comp. Gen. 541 (1970), and cases cited therein. We see no reason to treat differently the liquid paper changes.

In addition, we find no merit to the protester's contention that Fortec's bid was not responsive to the specification changes made in the June 2 amendment to the solicitation. Although Fortec's bid included Representations and Certifications, Standard Form 19-B, which shows a June 1, 1978 date, its Bid Form, Standard Form 21, is dated June 6, 1978, and specifically acknowledges receipt of the June 2 amendment.

As to Fortec's modification of its bid price just prior to bid opening, the record shows that on June 15, at 2:53 p.m., the Navy received a telephone call from Fortec, stating that it desired to modify its bid and for that purpose wanted to speak to its representative, an attorney who was present in the bid opening room and who had hand-delivered the Fortec bid package shortly before. Thereafter, this attorney signed and attached to Fortec's bid package a hand-written statement containing the reductions and resubmitted this bid package before the scheduled 3:00 p.m. bid opening. As evidence of this attorney's authority to reduce the bid, Fortec has submitted a copy of its managing partner's letter of June 2, 1978, transmitting the bid to the firm's attorney with instructions that arrangements be made to have a representative present at the opening to facilitate a last minute bid calculation and submission.

We have held that proof of agency may be submitted after bid opening. 49 Comp. Gen. 527 (1970). We believe the record clearly establishes that the attorney present at the bid opening was authorized to act as bidding agent for Fortec.

In connection with Fortec's modification of its bid the protester also argues that the modification should not be permitted, citing 49 Comp. Gen. 417 (1970) in which we refused to permit correction, after bid opening, of a timely, but allegedly erroneous, modification for failure to meet a strict evidentiary test. However, the cited decision is inapposite to the instant case because there is no question here of a correction after opening but merely a question of whether a timely modification is valid.

Finally, in the protester's rebuttal to the agency report it argues that it should receive the award because it is the low bidder for the combination of the two items solicited, and the Navy apparently now has available sufficient funds for a complete award.

In this connection, the solicitation contained two bid items and bids were to be evaluated as provided in the solicitation clause entitled "Additive and Deductive Items (1968 APR)":

"The low bidder for purposes of award shall be the conforming responsible bidder offering the low aggregate amount for the first or base bid item, plus or minus (in order of priority listed in the schedule) those additive or deductive bid items providing the most features of the work within the funds determined by the Government to be available before bids are opened. If addition of another bid item on the listed order of priority would make the award exceed such funds for all bidders, it shall be skipped and the next subsequent additive bid item in a lower amount shall be added if award thereon can be made within such funds * * *. [A]ll bids shall be evaluated on the basis of the same additive or deductive bid items * * *. The listed order of priority need be followed only for determining the low bidder. After determination of the low bidder as stated award in the best interests of the Government may be made to him on his base bid and any combination of his additive or deductive bid for which funds are determined to be available at the time of the award, provided that award on such combination of bid items does not exceed the amount offered for by any other conforming responsible bidder for the same combination of bid items."

Because the available funds as announced at the bid opening are sufficient to make an award only for item one, for which Fortec submitted the low bid, we could not object if Navy made such an award to Fortec even if funds in addition to the control amount stated at the bid opening subsequently became available and are sufficient to cover both items, for which the protester is low. The protester relies on Acorn Building Components, Inc., B-185605, July 1, 1976, 76-2 CPD 1, wherein we concluded that award should be made on the basis of the budgeted available funds rather than for the deductive alternative item in the absence of a determination that budgeted funds were not available.

Apparently, protester believes that a change in budgeted funds after opening would justify reevaluation of the low bidder and award on the basis of an alternative bid item. However, the Federal Procurement Regulations (FPR) rather than the Defense Acquisition Regulations (DAR) applied in Acorn. Unlike the FPR, DAR 2-201(b)(xli) (1976 ed.) specifically provides that a contracting officer must determine and record, prior to bid opening, the amount of funds available for a procurement involving base bids and alternates and that amount may be increased for determining the bid items to be awarded the bidder determined to be low as of bid opening only to the extent that such bidder remains low. See also H. M. Byars Construction Company, 54 Comp. Gen. 320 (1974), 74-2 CPD 233.

For the above reasons, the bid protest is denied.


Deputy Comptroller General
of the United States